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ATTORNEY FOR JUSTIN WHIPPLE

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

UNITED STATES,

Plaintiff(s),

v.

JOSEPH ORTIZ, et al.

Defendant(s).

Action No. CR 12-0119 SI

**MOTION TO COMPEL
 COMPLIANCE WITH
 SUBPOENAS DUCES TECUM**

Date: December 20, 2013

Time: 11:00 a.m.

Court: Hon. Susan Illston

Attached Document:

1. Declaration of David Andersen

**TO: THE ABOVE ENTITLED COURT, THE HEMISPHERE PROJECT, LA
 CLEARINGHOUSE, AND METRO PCS, INC.:**

PLEASE TAKE NOTICE that defendant, JUSTIN WHIPPLE, joined by defendants VICTOR FLORES, BENJAMIN CAMPOS-GONZALEZ, AND ARMANDO ACOSTA moves for an order directing the Hemisphere Project, LA Clearinghouse, and Metro PCS, Inc., to immediately produce records described in the subpoenas duces tecum served on the Hemisphere Project and Metro PCS. Those subpoenas were served on October 17 and 22, 2013, respectively. Both Metro PCS and the Hemisphere Project have acknowledged receipt of the subpoenas, but have declined to produce the records called for.¹ Defendants therefore ask that the Court order Hemisphere. LA Clearinghouse, and Metro PCS to produce the documents forthwith, or show cause why contempt sanctions should not be imposed.

¹ The defense also served subpoenas duces tecum on AT&T, Verizon and Sprint. However, these companies have indicated they do not possess records responsive to the subpoenas, and will produce a statement by counsel to that effect. Those letters have not yet been received. However, pending receipt, at this time the defense is not moving to compel with regard to those companies.

1 **STATEMENT OF FACTS**

2 On October 9, 2013, Mr. Whipple filed an application with the Court seeking
 3 authorization to issue a subpoena duces tecum pursuant to Federal Rule of Criminal
 4 Procedure 17(c). In pertinent part, this rule provides that “[a] subpoena may . . . command the
 5 person to whom it is directed to produce the books, papers, documents or other objects
 6 designated therein.” Fed. R. Crim. P. 17(c).

7 As required by the Local Rules, Mr. Whipple supported his request with “a declaration
 8 specifying the facts supporting the issuance of the subpoena along with a proposed order.” Crim.
 9 L.R. 17-2(a)(1). The supporting declaration set forth sufficient information to satisfy the three
 10 hurdles to issuance of a Rule 17(c) subpoena: relevancy, admissibility, and specificity. *See*
 11 *United States v. Nixon*, 418 U.S. 683, 700 (1974). In particular, the supporting declaration noted
 12 that the subpoenaed documents contain highly relevant impeachment material concerning the
 13 government’s wiretap applications and affidavits, which defendants intended to admit as
 14 evidence in support of their motion to suppress wiretap evidence pursuant to *Franks v.*
 15 *Delaware*.

16 By order dated October 10, 2013, the Court approved Mr. Whipple’s application and
 17 ordered that the subpoenas be issued. The subpoenas provided that responsive materials be
 18 returned to the Court within 15 days of service of the subpoena.

19 Following numerous telephone conversations between defense counsel and the entities to
 20 which the subpoenas were directed, defendants served the subpoena directed to Hemisphere
 21 Project on October 17, 2013, and the subpoena directed to Metro PCS on October 22, 2013.

22 The documents at issue in this motion consist of two categories: (1) orders issued by the
 23 California Superior Court purportedly authorizing law enforcement officers working for the
 24 Department of Justice’s HIDTA Task Force to access detailed phone records for various cell
 25 phones involved in this case; and (2) correspondence between the investigating law enforcement
 26 agents and the “Hemisphere Project,” including call records produced in accord with such
 27 correspondence.

28 On November 12, 2013, defense counsel received a phone call from California Deputy

1 Attorney General Raymond Hamilton. Mr. Hamilton indicated he had been assigned
 2 responsibility to respond to the subpoena served on the Hemisphere Project, but was unaware of
 3 the Project, and needed time to respond. Defense counsel agreed to an extension of time. Dep.
 4 AG Hamilton later contacted defense counsel to say that he had spoken with AUSA Wilson
 5 Leung regarding this matter. In that conversation Mr. Leung indicated that he intended to file a
 6 motion to quash the subpoena, and requested that Mr. Hamilton not comply with the subpoena
 7 until after that motion had been heard. Mr. Hamilton informed defense counsel that he would
 8 honor that request. Deputy AG Hamilton delivered a letter to counsel memorializing his decision
 9 to not comply with the subpoena, but his agreement to comply within fourteen days of this
 10 Court's ruling on Government's motion to quash, should that motion be denied. See attached
 11 declaration of David Andersen.

12 On or about October 31, 2013, Patty Caldwell, a Senior Counsel for Law Enforcement
 13 Relations with Metro PCS and T Mobile, called defense counsel and indicated Metro PCS did
 14 not intend to produce the records described in the subpoena. This intent was to be confirmed by
 15 letter, but defense counsel has not received a confirming letter. See Declaration of David
 16 Andersen, attached.

17 **ARGUMENT**

18 The subpoenas duces tecum at issue in this motion have been duly authorized by the
 19 Court and served on the appropriate parties. Metro PCS has acknowledged receipt of the
 20 subpoena but flatly indicated it does not intend to comply. The Hemisphere Project has
 21 acknowledged receipt of the subpoena, but asked for a delay in production until such time as the
 22 U.S. Attorney has had the opportunity to file a motion to quash. The Court should therefore
 23 order Metro PCS to comply with the subpoena immediately. The Court should also order Metro
 24 PCS to immediately comply with the subpoena, if and when a motion to quash is denied.

25 The Sixth Amendment right to compulsory process, as embodied in Rule 17(c) of the
 26 Federal Rules of Criminal Procedure, requires the following as a basis for a defense subpoenas
 27 duces tecum in a criminal case:

28 A subpoena may also command the person to whom it is directed to produce the
 books, papers, documents or other objects designated therein. The court on

1 motion made promptly may quash or modify the subpoena if compliance would
 2 be unreasonable or oppressive. The court may direct that books, papers,
 3 documents or objects designated in the subpoena be produced before the court at a
 4 time prior to the trial or prior to the time when they are to be offered in evidence
 and may upon their production permit the books, papers, documents or objects or
 portions thereof to be inspected by the parties and their attorneys.

5 In *United States v. Nixon*, 418 U.S. 683 (1974), the Supreme Court confirmed that the
 6 showing required to force compliance with a Rule 17 subpoena was as follows:

- 7 1. That the documents are evidentiary and relevant;
- 8 2. That they are not otherwise procurable reasonably in advance of trial by exercise
 9 of due diligence;
- 10 3. That the party cannot properly prepare for trial without such inspection and
 11 inspection in advance of trial and that failure to obtain such inspection may tend
 12 to unreasonably delay the trial;
- 13 4. That the application is made in good faith and not intended as a general “fishing
 14 expedition.”

15 *Nixon*, 418 U.S. at 698-699; see also *United States v. Reed*, 726 F.2d 570, 577 (9th Cir.), cert.
 16 denied, 469 U.S. 871 (1984) (holding Rule 17(c) requires a showing of relevancy, admissibility
 17 and specificity to support the issuance of a subpoena duces tecum.)

18 The subpoenas served on Metro PCS and Hemisphere Project, as authorized by the Court,
 19 were justified by a detailed *ex parte* application that explained why the documents were relevant,
 20 as well the manner in which documents were admissible in support of defendants’ pre-trial
 21 motions to suppress wiretap evidence. The application also specifically described the records
 22 sought, and the production requirements set out in the subpoenas authorized by the Court reflect
 23 the exact degree of specificity described in the defense application. Clearly, the defense
 24 subpoenas do not constitute a “fishing expedition.” Instead, the subpoenas seek a limited, highly
 25 relevant body of documents pertaining to the government’s wiretap investigation and the veracity
 26 of the government’s wiretap applications.

27 **CONCLUSION:**

28 Neither Metro PCS nor the hemisphere Project have provided the Court with any

1 explanation based on law or fact regarding why they should be exempt from complying with this
2 Court's subpoenas. Therefore, the Court should order both parties to comply.

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4 DATED: November 20, 2013

5 Respectfully Submitted,

6 /s/ David L. Andersen

7 David L. Andersen
8 Attorney for JUSTIN WHIPPLE
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PROOF OF SERVICE BY MAIL

I am a resident of Alameda County. I am over the age of eighteen years and not a party to the within entitled action. My business address is 385 Grand Avenue, Suite 300, Oakland, California 94610. On November 22, 2013, I served a true copy of the within:

Motion To Compel Compliance With Subpoenas Duces Tecum
And Accompanying Declaration Of David Andersen

in the matter of:

United States v. Joseph Ortiz, et al.
United States District Court for the Northern District of California,
Case No. CR 12-0119 SI

on the entities listed below by:

[X] Placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Oakland, California, addressed as follows.

Raymond Hamilton
Deputy Attorney General
1515 Clay Street, 20th Floor
P.O. Box 94612-0550

Metro PCS Compliance Department
2250 Lake Side Blvd.
Richardson, TX. 75082

For Hemisphere, LA Clearinghouse

For Metro PCS

[] By delivering or causing to be delivered by hand a true copy at the address listed below in an envelope addressed as stated below.

I certify that I am a member of the bar of California or an employee of a member of the bar licensed to practice in this district at whose direction this mailing was made.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 22, 2013, at Oakland, California.

/s/ David L. Andersen

DAVID L. ANDERSEN (S.B. NO. 50010)
 ANDERSEN & ZIMMER
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 OAKLAND, CA 94610
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ATTORNEY FOR JUSTIN WHIPPLE

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

UNITED STATES,

Plaintiff(s),

v.

JOSEPH ORTIZ, et al.

Defendant(s).

Action No. CR 12-0119 SI

**DECLARATION OF DAVID
 ANDERSEN IN SUPPORT OF
 MOTION TO COMPEL
 COMPLIANCE WITH SUBPOENAS
 DUCES TECUM**

Date: December 20, 2013

Time: 11:00 a.m.

Court: Hon. Susan Illston

David L. Andersen declares as follows:

1. I am an attorney licensed to practice before this Court. I am counsel of record for defendant JUSTIN WHIPPLE.

2. At my direction, Timothy Finnegan, Esq. caused two subpoenas duces tecum to be served.

3. The first was to Metro PCS, Inc., and called for production of:

(1) Copies of all correspondence generated, by either party, from April 25, 2010, through May 10, 2010, between employees of your company and representatives of the San Mateo County District Attorney; the Daly City Police Department; the South San Francisco Police Department; the U.S. Department of Justice, San Francisco Field Office; the California Department of Justice; or the California Electronic Intercept Court Order System, regarding wiretap interception orders for the following phone lines: (650)834-5489; (650) 871-1994; (415)573-5888; (650)826-7354; (650)243-1711; (650)754-3464; (650)201-6716; (650) 921-0260; (650) 766-1529; (650) 219-2600; (650) 716-6485.

(2) Copies of all records generated and preserved in any way concerning initiation of interception, termination of interception, or changes in interception parameters concerning telephone numbers (650) 834-5489; (650) 871-1994; (415)573-5888; (650)826-7354; (650) 243-1711; (650) 754-3464;

(650) 201-6716; (650) 921-0260; (650)766-1529; (650)219-2600; (650)716-6485; between April 25, 2010 and May10, 2010. This request includes, but is not limited to, work orders, stored computer records, stored cell phone network records, "data dumps, "deliveries of data over network portals. historical data, call detail records, GPS information, dialed digit information, dialed digit extraction information, post cut-through digits, cell site data, cell site location data, GPS data, call progress locations (automated message accounting data) connected to the use of each target telephone numbers, authorizations concerning the installation and or use of equipment known as dialed recorders, authorization or installation and/or use of equipment to trap and trace and identify the telephone numbers, and any other data delivered to law enforcement in any format.

4. The second subpoena was to the Hemisphere Project, LA Clearinghouse, and called for production of:

(1) Copies of all requests for phone records and/or data made by local, state or federal agents involved in "Master Case Number" DCDP#10010584, or "Other Case Number" SSFPD#10-8541, that were processed through Hemisphere Project, LA Clearinghouse, or the Northern California Regional Intelligence Center; (2) Copies of all phone data and records provided to law enforcement officers and agents involved in the investigation of "Master Case Number" DCDP#10010584, or "Other Case Number" SSFPD# 10-8541 by means of requests processed by the Hemisphere Project, LA Clearinghouse, or the Northern California Regional Intelligence Center.

5. On October 31, 2013, I spoke by telephone with a woman who identified herself as Patty Caldwell, Senior Counsel for Law Enforcement Relations of Metro PCS and T-Mobile. She informed me that Metro PCS had received the SDT, and that it had been referred to her. However, Metro PCS would not respond. She also informed me that I would receive a confirming letter, but that letter has not yet been received.

6. I had two conversations with Raymond Hamilton, a California Deputy Attorney General with regard to the SDT to Hemisphere Project, LA Clearinghouse. The first conversation occurred on October 30, 2013. In that conversation Mr. Hamilton informed me that he was unaware of the Hemisphere Project, and would need additional time to determine if responsive records were in the state's control. We agreed upon an extension of the compliance date to November 20, 2013.

7. The second conversation with Mr. Hamilton occurred on November 12, 2013. Mr. Hamilton informed me that he had consulted with AUSA Wilson Leung. Mr. Leung stated his intent to file a motion to quash the subpoena to Hemisphere, and asked that Mr. Hamilton not

1 comply until after that motion to quash had been heard. Mr. Hamilton stated to me that it was
2 his intent to honor that request. However, if the motion to quash is denied, Mr. Hamilton stated
3 that he would comply within fourteen days of this court's decision.

4 I declare under penalty of perjury under the laws of the United States that the above is
5 true and correct.

6 Executed on November 22, 2013, at Oakland, California.

7 /s/ David L. Andersen
8 Counsel for Defendant
9 Justin Whipple
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